

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| In re: | : | |
| ECKHART et al, | : | Docket #1:20-cv-05593- |
| | : | RA-GWG |
| | : | |
| Plaintiffs, | : | |
| - against - | : | |
| FOX NEWS NETWORK, LLC et al, | : | New York, New York |
| | | April 20, 2021 |
| Defendants. | : | <u>TELEPHONE CONFERENCE</u> |
| | : | |

PROCEEDINGS BEFORE
THE HONORABLE JUDGE GABRIEL W. GORENSTEIN,
UNITED STATES MAGISTRATE JUDGE

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None

E X H I B I T S

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None

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2 THE CLERK: This is the matter of Eckhart versus
3 Fox News Network, docket number 20-civ-5593.

4 Counsel, state your names for the record, starting
5 with plaintiff.

6 MR. MICHAEL WILLEMIN: Michael Willemin and Renan
7 Varghese of Wigdor LLP for the plaintiffs.

8 MS. KATHLEEN MCKENNA: Kathleen McKenna of Proskauer
9 Rose LLP for Fox News Network, LLC. And I'm joined by my
10 associate, Mr. Grossman-Boder, and by my co-counsel from Jones
11 Day, Anthony Dick.

12 MS. CATHERINE FOTI: Catherine Foti from Morvillo,
13 Abramowitz, Grand, Iason, & Anello, P.C., on behalf of the
14 defendant, Ed Henry. And I'm joined by my associate, Douglas
15 Chalke; and my co-counsel Jayne Weintraub from Sale &
16 Weintraub.

17 HONORABLE GABRIEL W. GORENSTEIN (THE COURT):
18 Okay. Thank you, everyone. First, let me remind everyone
19 the conference is being recorded, but no recording by
20 anyone else is permitted; and any dissemination of the
21 audio of these proceedings is prohibited. I'm going to ask
22 everyone to keep their phone on mute unless they're
23 speaking, in which case, they should unmute it.

24 All right, we're here based upon essentially a
25 renewed application by defendant Fox News Network, LLC, to

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2 continue the stay of discovery. I already have written the
3 parties telling them I wouldn't be asking any specific
4 questions about the strength-of-the-motion prong of the
5 stay dispute unless they want to raise it in what they say
6 to me -- I guess they're welcome to do so.

7 So since it's Fox's motion, I'll hear from them
8 first.

9 MS. MCKENNA: Good morning, your Honor. And thank
10 you. We believe that Judge Abrams' prior stay of discovery
11 should not be disturbed. We believe Fox has demonstrated
12 good cause for continuing the stay and easily meets the
13 three-part test under *Hong Leong*. As your Honor noted, the
14 parties have been notified we are not going to be meeting
15 on [indiscernible] substantial grounds for dismissal, the
16 first prong of the test.

17 THE COURT: Ms. McKenna, can I just tell you
18 you're -- somehow you're not that sharp in terms of the
19 voice quality. So I don't know if you can move closer to a
20 microphone or anything you can do, it will help. But, I
21 mean, it's sort of understandable; it's a little bit of a
22 struggle.

23 MS. MCKENNA: Well, let the record reflect my
24 children would be delighted that someone's asking me to
25 speak more loudly and clearly. I'm definitely going to

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2 request a copy of the transcript, then, your Honor.

3 Is this any better? I've switched headphones.

4 THE COURT: Yes, that actually is better, yes.

5 Thank you.

6 MS. MCKENNA: Wonderful. Okay, great. As I was
7 noting, your Honor, we don't need to address the
8 substantial grounds for -- [indiscernible] -- so I'm going
9 to turn to the other two prongs that -- [indiscernible] --
10 even written discovery would impose a significant burden on
11 the clocks. And we believe that neither the plaintiff nor
12 defendant, Ed Henry, would suffer prejudice from continuing
13 the stay. In fact, the only thing that's really changed
14 since Judge Abrams entered the stay is that the motions to
15 dismiss are now fully briefed.

16 With the respect to the ground of the *Hong Leong*
17 test that focuses on the breadth of discovery, we believe
18 that discovery is likely to be broad and potentially
19 unnecessary. And, of course, where discovery is likely to
20 be broad and significant, the stay would be warranted
21 pending a substantial Motion to Dismiss. Here, the likely
22 breadth of discovery is pretty clear from the Third Amended
23 Complaint. We have a 276-paragraph Complaint; the
24 allegations date back to 2013; the Third Amended Complaint
25 makes claims that involve multiple former and current

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2 employees of Fox News; the Third Amended Complaint
3 references what are alleged to be multiple internal
4 company-wide and privileged investigations. So it is
5 pretty obvious, from the face of the Third Amended
6 Complaint, that we're going to have expensive and time-
7 consuming requests dating back many years that inevitably
8 is going to involve, you know, hundreds of hours of time of
9 conducting and reviewing documents, to say nothing of
10 addressing issues of privilege. And this is particularly
11 true where the face of the Complaint alleges broadly
12 allegations about what the company assertedly knew or
13 should have known. And I would note that back in August,
14 Judge Abrams recognized that even service of written
15 discovery was going to impose a burden and not be
16 appropriate. And we certainly think it's less appropriate
17 now, given the substantial Motion to Dismiss that's been
18 filed.

19 There's an allegation that has been made by
20 defendant Henry that there's really an overlap here and
21 discovery would be the same if the motions are granted.
22 That's plainly not true. Discovery will not be the same if
23 Fox is dismissed from this action. The sex-trafficking
24 claims against Fox are entirely distinct; they involve the
25 oldest allegations asserted in the Complaint. They involve

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2 questions, as I've noted, about what the company allegedly
3 should have known, and no issues of what Fox knew or should
4 have known or issues of retaliation will be present if Fox
5 is dismissed from the action. If Fox is dismissed from the
6 action, discovery would solely be focused on Mr. Henry's
7 actions, what he did or didn't do. So we believe that the
8 burdens of discovery are pretty obvious from the face of
9 the Third Amended Complaint and therefore should be stayed.

10 Additionally, we believe that a short stay of
11 discovery, given that we're now months from the motion now
12 being fully briefed, this short additional stay of
13 discovery to disposition of the Motion to Dismiss cannot
14 prejudice either the plaintiff or Mr. Henry. This Court
15 has previously found that conclusory allegations about
16 delay doesn't establish prejudice. Obviously, delay alone
17 is not sufficient to cause prejudice because, otherwise,
18 every motion would involve the delay that's inherent in the
19 stay. Judge Abrams thought in August there would be no
20 significant prejudice from a brief stay. The claims that
21 have been made by defendant Henry that this causes
22 reputational damage to him, Judge Abrams didn't find that
23 persuasive for lifting a stay. And she was going to wait
24 to see the strength of the dispositive motion. And,
25 obviously, we think that's important here.

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2 We also think discovery from Fox News doesn't
3 address the alleged reputational harm from either the
4 plaintiffs' point of view or defendant Henry's point of
5 view because that's about their sexual encounters with each
6 other. And those sexual encounters occurred with any
7 knowledge of Fox News -- plaintiff doesn't even allege that
8 Fox News knew that they had had these sexual encounters in
9 a relationship. So, really, what we're left with is the
10 question of delay. And given that the motions are on the
11 cusp of being decided, there is less time in front of us, I
12 think, your Honor, than there is behind us. We would
13 respectfully suggest that we've met the good-cause standard
14 in *Hong Leong* and that discovery should be stayed as it
15 regards Fox News. And I'm happy to answer any additional
16 questions the Court may have.

25 MS. MCKENNA: Yeah, if those two want to

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2 voluntarily exchange information to shed some light on
3 these encounters they had with each other, Fox has, you
4 know, no objections at -- there's no reason to drag Fox
5 into it. But, yes, your Honor, if they want to conduct
6 discovery as to their relationship for each other, as long
7 as Fox is not dragged into it, I don't see that there's any
8 negative consequence to the Fox defendant.

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THE COURT: All right, I'll hear from plaintiff
next.

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MR. WILLEMIN: Thank you, your Honor. So

Ms. McKenna referenced a few of the things that Judge Abrams stated back in August when a stay was initially imposed. But I think, you know, the most important thing that Judge Abrams said was that this would be revisited at this time. And so I don't think that anything she said should be an indication that the motion to stay with the revisiting of the issue of a stay, nothing that she said should be deemed sort of dispositive on that front.

I won't, you know, belabor the point, but I think the most important issue here is the issue of burden, and really not just burden -- because of course there's going to be some burden -- but the issue of whether the burden is undue or if it's somehow unnecessary. And we submit that it's not. In this case although there's 200-and-something

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2 paragraphs in the Complaint and a lot of pages -- I'll
3 grant your Honor that -- this case revolves entirely around
4 defendant Henry's conduct and what he did both to our
5 client and to other individuals while working for Fox News
6 because even if, let's say, the only claim that remains is
7 the sexual assault claim or the, you know, the sex
8 trafficking claim against Ed Henry or under the New York
9 City law, all of the other activity that he engaged in goes
10 to Mr. Henry's state of mind, his motive, his modus
11 operandi; it's general background, and it really goes to
12 his intent with respect to that particular sexual
13 encounter. And if his conduct with respect to any of the
14 allegations in the Complaint is being discussed or
15 documented or in some way described in documentation that
16 Fox has, that is going to be subject to discovery
17 regardless of whether Fox is in the case or Fox is not in
18 the case. And --

19 THE COURT: Well, Mr. Willemin, I mean, let's just
20 get practical. If you're taking the position that you will
21 limit -- that Fox stays on the case -- that you will limit
22 your discovery to whatever would have been available to you
23 had they not been in the case and there were no claims
24 against them and they were third party, we can start
25 talking about that. But to have someone, you know, review

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2 ESI for the specific Ed Henry claims once and then do it
3 again for, you know, the claims specific to Fox, you're
4 simply ignoring the fact that that would be incredibly
5 burdensome. Now, if you want to limit --

6 MR. WILLEMIN: Your Honor --

7 THE COURT: -- yourself to the first thing, then
8 we can start talking.

9 MR. WILLEMIN: Your Honor, I think -- I guess my
10 point -- and I certainly wouldn't suggest that we should do
11 this as an iterative process -- what I'm suggesting is that
12 the defendants are arguing that there is not substantial
13 overlap or at least could potentially not be substantial
14 overlap in discovery. And my --

15 THE COURT: I don't think that's their point. I
16 think the point, at least the point that I'm taking from
17 it, is that there is additional discovery that would be
18 required from them if they remained as a party than would
19 be required of them if they were merely a third party being
20 subpoenaed for documents relating to the Henry matter. So
21 if you admit those are two different things -- if you don't
22 think they're two different things, then we can start
23 talking. But if you admit, as I think you have to, they're
24 two different things, then it's an iterative process if you
25 make them do it twice, right?

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MR. WILLEMIN: Well, I guess my point is that I
don't understand why we would do it twice. So perhaps --
and I would like to address that point -- perhaps there --
I'm not sure that there are, frankly -- documents that
would be subject to discovery if Fox is in the case but not
subject to discovery if Fox is out of the case.

8

THE COURT: Well, hold on. That's a very
important premise, so let's talk about that. You have --
in order to keep Fox in this case, you have to talk about
what they should have known, right?

12

MR. WILLEMIN: That's correct. And this is the
point that I wanted to drive to is that what -- to the
extent that something goes to what Fox would have or should
have known, it's going to be a document that relates to
Mr. Henry's conduct. So whether that document is one
that's sent to a low-level employee or one that's sent
to -- I'm getting a lot of feedback for some reason.

19

THE COURT: No. Hopefully -- I'll remind everyone
to put themselves on mute if they're not speaking. Go
ahead.

22

MR. WILLEMIN: So the document, a classic document
that goes to state of mind, an email --

24

THE COURT: But hold on, hold on. Before we bore
in too finely on this, you have a host of allegations about

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2 other people who worked at Fox. So are you prepared to
3 give up on discovery as to all those people?

4 MR. WILLEMIN: No, those -- it's only insofar as
5 those people relate to Mr. Henry. So again, it's
6 Mr. Henry's conduct towards those people which is going to
7 be relevant regardless of whether Fox is in the case. This
8 is -- at the end of the day, if we have to prove a claim
9 against Mr. Henry that he acted in a certain way towards
10 our client, his conduct with respect to all of the
11 allegations in the Complaint -- and that's what all those
12 allegations relate to -- his conduct is relevant. And so
13 to the extent that his conduct is being discussed at
14 various levels at Fox, that would be your, I guess,
15 ordinary way of proving Fox's knowledge of Mr. Henry's
16 conduct. Even if it's not relevant to Fox's knowledge
17 because Fox's knowledge is no longer relevant to the case,
18 those documents are going to be describing Mr. Henry's
19 conduct in some way, shape or form, whether it's concerns,
20 complaints raised about him, etc.

21 So what I would suggest is to the extent that
22 there are documents that are outside of the scope of any
23 claim that would rely only against Mr. Henry, what we are
24 just taking the position is that there isn't a substantial
25 number of those documents. And they haven't -- they're not

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2 documents for --

3 THE COURT: Would you like to give up on getting
4 them?

5 MR. WILLEMIN: Your Honor, I wouldn't -- no. I
6 mean, this is one consideration. I think that to the
7 extent that there are some documents that are outside of
8 the scope of a claim against, you know, Mr. Henry in
9 particular, I certainly wouldn't be willing in the context
10 of still having claims against Fox to give up on those
11 documents. But just because there's a -- the mere fact
12 that some documents exist, the mere fact that there's not
13 necessarily a 100% overlap, that doesn't require a stay to
14 be put into place. It's one of the facts, and in this case
15 a factor, I think, that cuts sharply towards our position,
16 which is that there is substantial overlap. And the
17 documents that Fox contends are going to be problematic or
18 not be subject to discovery are ones that they claim would
19 go to their knowledge. And that's what they've identified
20 as the set of documents that are going to be problematic.
21 And all I'm saying is that's actually not true because
22 those documents are still going to be subject to discovery
23 whether they're for Fox's state of mind or whether they're
24 for the description therein of whatever Mr. Henry did. And
25 so I think there will be very substantial overlap, which

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2 cuts in favor of plaintiff on the issue of continued stay.

3 And then in terms of -- with respect to prejudice,
4 it is true that, you know, mere delay alone obviously
5 doesn't require not having a stay, just as making a Motion
6 to Dismiss does not require having a stay. But in this
7 case I don't think that it is just mere delay. We do have
8 a case in which two parties of the three are claiming that,
9 from a reputational perspective, this delay is actually
10 harming them. I obviously don't take the position that
11 Mr. Henry's concerns are warranted, but he's saying that he
12 can't get a job now. And Ms. Eckhart is saying that she
13 has been maligned in various ways and that her reputation
14 is one that needs to be restored. So it's not a situation
15 where we have a breach of contract and we're just waiting
16 an extra six months to get some sort of lump-sum payment;
17 we have a situation where two individuals are saying this
18 is impacting my life in negative ways, and the quicker that
19 we can get this resolved, the quicker that that negative
20 impact on my life can go away. So it's not, I don't think,
21 a prototypical case of, you know, it's just delay; there is
22 attendant damage that's being done here, at least according
23 to two parties. And I think that that -- I mean, Fox can't
24 simply just say that that's not happening. You know,
25 that's something that I think needs to be considered. And

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2 for the same reasons I just described before, I don't think
3 that there's any significant prejudice, if any prejudice at
4 all, to Fox in having to, you know, begin discovery at this
5 time.

6 THE COURT: Are you interested in proceeding with
7 complete written discovery between you and Henry?

8 MR. WILLEMIN: That is something I obviously
9 hadn't given any thought to. And to be honest, I would
10 want to speak with my client about it because my concern on
11 that is just that we're going to end up having an
12 obviously, you know, incomplete picture of things; whereas,
13 I'd prefer to have, you know, as complete a picture as
14 possible as early as possible. And --

15 THE COURT: Well, I'm not saying that -- I'm
16 asking -- I should have made it clearer. In the event you
17 were to lose this motion, are you interested in that?

18 MR. WILLEMIN: It's something that I would
19 consider. I honestly couldn't give you a "I will do it,"
20 or "I won't do it" answer at this moment. I do think it's
21 something that I should consult with my client on. And so
22 I would be open to it, but I can't commit that that's
23 something that I would for sure do.

24 THE COURT: Okay. Anything else?

25 MR. WILLEMIN: That's all, your Honor.

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THE COURT: All right, Ms. Foti?

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MS. FOTI: Good morning, your Honor. So I'd like to start with the actual prejudice that our client has been suffering because I did say in August that what was so difficult here is that my client's reputation has been completely demolished, and he is out of a job. And it has now been -- how many months is that? -- eight months now that he continues to be out of a job, unable to clear his reputation. And that, in fact, is significant prejudice that is coming from this delay in trying to move this case forward.

13

And the fact that Fox is pointing to, I guess, the documents it might have in the system that it -- would have nothing to do with repairing Mr. Henry's reputation, that's not the point. The point is that we need to move this case forward as quickly as possible because we are very confident that my client's reputation will be restored once the discovery has become available and we're able to basically win what we think would be a victory in, you know, ultimately in this case.

22

So I think the prejudice here is incredibly significant. And, you know, this may be the only time that I actually will be agreeing with the plaintiff in this case, because I agree that -- with what Mr. Willemin said

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2 in terms of that it is of a different type than just
3 regular, you know, prejudice suffered in any case just
4 because there has been some delay. So I feel like we --
5 that certainly that weighs completely in our favor in terms
6 of having discovery go forward as to both parties, Fox and
7 the plaintiff.

8 But we are willing to have discovery directly with
9 the plaintiff if that's the only alternative. I don't
10 think that should be the only alternative because I believe
11 that the idea that Fox would still be subject to production
12 of the same documents that we would be requesting is very
13 clear. We do not have the same issue with Fox in terms of
14 whether or not, you know, what the company knew about the
15 relationship, needing to prove or not prove anything about
16 that. What we need are the communications that the
17 plaintiff may have had with other people, that we had with
18 the plaintiff over email, our communications. We need some
19 basic discovery, and that same discovery would be requested
20 by subpoena even if Fox were to win a complete dismissal on
21 this case. So we feel that not only is the prejudice
22 tremendous and weigh in favor of lifting the stay, the
23 discovery that we would need would be the same, and we
24 would really suggest to your Honor that that -- you know,
25 that discovery, maybe there's a way to limit the nature of

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2 the discovery that we are allowed to take as to Fox; we
3 feel that the discovery that we would want as to Fox would
4 be the same were they not in the case.

5 That's all I really have, your Honor.

6 THE COURT: Okay. I'll give Fox a chance to
7 reply.

8 You may still be on mute, because we're not
9 hearing anything from Fox.

10 MS. MCKENNA: Thank you, your Honor. That's the
11 buzz word of 2021, I guess, "You're on mute." I apologize.

12 It is the strong view of Fox that with respect to
13 Ms. Foti's argument about reputational repair, we are fully
14 confident that, if this matter gets litigated, either with
15 or without Fox, that it will not result in reputational
16 repair. To the extent that, as I said to your Honor
17 before, that Mr. Henry and Ms. Eckhart want to exchange
18 discovery between themselves that reflect upon the nature
19 of their relationship, so be it. But we don't think Fox
20 should be dragged into it, certainly not before the
21 disposition of the motion so we know what the contours of
22 the claims in the matter.

23 With respect to Mr. Willemin's comments that the
24 discovery will be the same and the overlap will be the
25 same, he's either right or he's wrong. I think he's wrong,

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2 and it's pretty clear that the nature of the claims against
3 Fox will be entirely different if its motion is granted.
4 If he's right that discovery is the same, frankly, I think
5 it argues for hearing the Court's ruling on the motion so
6 we would know the scope and the contours of the claims and
7 see what discovery is needed. And as we noted in our
8 papers, your Honor, it is not uncommon for stays to be
9 granted in employment cases. So even if Mr. Willemin were
10 right -- well, two out of the three parties here would like
11 to have discovery -- the plain fact of the matter is that
12 the scope of the claims, the what survives, what survives
13 if anything against Fox, really argues, certainly at this
14 late stage, that we wait a few more months before the
15 disposition of the pending motion.

16

That's all I have, your Honor.

17

THE COURT: Okay. I've considered the parties' letters and the arguments, and I am applying the standard for stays pending a Motion to Dismiss expressed in many cases, including *Hong Leong Finance Limited*, 297 F.R.D. 69. There are three factors: the breadth of discovery sought, prejudice that would result, and the strength of the motion.

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With respect to the strength of the motion, I've reviewed the pending papers. And the defendants' arguments

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2 are certainly supported by substantial arguments for
3 dismissal with respect to that factor.

4 As to the prejudice that results -- would result,
5 I'm certainly sympathetic to the plaintiffs' wish to move
6 this case along and to Henry's desire to advance it for
7 purposes of protecting his reputation. And that's a factor
8 to be considered, but there are certain aspects of
9 prejudice that don't exist in this case, such as, you know,
10 pending witnesses who are elderly or documents that are in
11 danger of being destroyed or anything like that. So the
12 prejudice here is not of the type that is normally viewed
13 as being the sort of prejudice that might result in the
14 denial of a stay.

15 Also, the plaintiff has the keys in her pocket, as
16 it were, to advancing this case in a significant way
17 because Henry has already said he's prepared to go down the
18 road of written discovery with the plaintiff. And if
19 there's a dispute about that, I would certainly invite
20 Henry, if he wants, to make a motion to lift the stay as to
21 the plaintiff if they can't come to agreement on that.
22 That's up to him if he wants to make that motion. But that
23 certainly does something to lessen the prejudice because
24 the more that can be accomplished in terms of discovery,
25 even if it's as to only the discovery between those

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2 parties, the better. I mean, there may be disputes, there
3 may be things that can be resolved; all of that could be
4 taken care of before we had to get Fox involved.

5 Finally, as to the breadth of discovery, I just --
6 you know, there are doctrines that limit what a party in
7 their capacity of a non-party in a proceeding has to do
8 versus as party and in terms of the burdens that we're
9 prepared to impose on non-parties. And it's going to be a
10 very different contemplation of discovery whether Fox is in
11 the case versus whether it turns out to be a non-party in
12 the case. And, you know, there may be substantial overlap,
13 but in the days of electronic discovery it's a very
14 expensive process to redo searches and to add custodians
15 that might not have otherwise been searched if you're
16 looking at upper-level people that you might not have
17 looked at in response to a subpoena.

18 So after having balanced all these factors, I
19 conclude that the stay previously ordered by Judge Abrams
20 should continue.

21 That was my only agenda for today. I'll just
22 check with each of the parties if they think there's
23 anything else that we need to do today. I guess I'll start
24 with the defendants. Ms. McKenna, anything else for today?

25 MS. MCKENNA: No. Thank you, your Honor.

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THE COURT: Mr. Willemin?

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MR. WILLEMIN: No, your Honor.

4

THE COURT: Ms. Foti?

5

MS. FOTI: No, your Honor. Thank you.

6

THE COURT: Okay. Thank you, everyone. Good-bye.

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(Whereupon, the matter is recessed.)

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3 C E R T I F I C A T E

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5 I, Carole Ludwig, certify that the foregoing
6 transcript of proceedings in the case of Eckhart et al v.
7 Fox News Network, LLC et al, Docket #20-cv-05593-RA-GWG,
8 was prepared using digital transcription software and is a
9 true and accurate record of the proceedings.

10

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Signature Carole Ludwig

15

Carole Ludwig

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Date: April 21, 2021

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